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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1944.

No. **440**

MAX GOLDBERG,

*Petitioner,*

*vs.*

RECONSTRUCTION FINANCE CORPORATION,

*Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT AND BRIEF IN  
SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI.

---

Petitioner, Max Goldberg, the defendant and appellant below, files this petition for the issuance of a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit, to review its judgment, modifying and affirming the judgment of the District Court of the United States against the petitioner in the sum of \$18,787.88 plus 5% interest from July 8, 1941, to the end that its judgment may be reversed and set aside.

**Summary Statement of the Matter Involved.**

On December 17, 1943, the District Court entered a summary judgment against petitioner, Max Goldberg, an alleged beneficial owner of Bank Stock, for \$18,787.88, plus

interest at 5% from May 1, 1937, the date of the entry of a judgment against the registered owner of the bank stock, Robert W. Martin. The bank stock consisting of 930 shares were purchased by a Syndicate, wherein Petitioner was one of the three trustees and one of many shareholders. The bank stock was purchased with funds of the Syndicate, by the Syndicate and for the Syndicate, and was registered in the name of Robert W. Martin, its agent. The judgment against Goldberg was based on his subscription for 187.8788/10.000 of the shares in the Syndicate, a valid Illinois trust, and on the theory that as a "share-holder" of the "trust", he was the beneficial owner of the *pro-rata* fractional shares of the 930 shares of bank stock which was registered in the name of Robert W. Martin.

The Court of Appeals held that due to the fact that there was a *bona fide* dispute as to the basis of a claim, respondent was not entitled to interest from the date of the judgment against Martin; that it was in "doubt" whether under the Illinois law interest was allowable from the date when the suit was filed, July 8, 1941, or from the date of the entry of the judgment, December 17, 1943. The Court of Appeals resolved the doubt against the Petitioner and modified the judgment to bear interest from July 8, 1941.

### **Theory of Liability:**

The theory of the Petitioner's liability is completely different from any theory heretofore advanced to impose the superadded stockholders' liability against one who was neither the "record" nor the "equitable" owner of the Bank Stock.

In each case where such a liability was imposed there was *no dispute* that the defendant was the *beneficial owner*. Here, Petitioner was *neither the record nor beneficial owner*. Martin, against whom the judgment was entered



on May 1, 1937, was the record owner. *The beneficial owner was a "Syndicate", a "Massachusetts Trust", the validity of which is well established in Illinois and conceded by the Court. Petitioner was one of the "Trustees" and one of the "Shareholders". His alleged beneficial ownership is on a far-fetched theory that as a "Shareholder" of the "Trust" (the beneficial owner of the stock) he, the Petitioner, was the beneficial owner of the Bank Stock for his pro-rata interest in the shares of the "Trust" and he was, therefore, liable.*

### **Inconsistent Remedies:**

Respondent was *not certain* as to its "remedies" or "claims". Its complaint was founded on *three inconsistent* theories: (1) that as a "shareholder" defendant was liable for his *pro-rata* interest in the sum of \$18,787.00 (R. 36), the amount of the judgment; (2) that he is liable as a "partner" (R. 37) on the theory that the trust was *invalid* or (3) as a "Trustee" of a valid trust, for alleged failure to limit his liability. Under the latter two remedies the defendant's liability would have been for the full amount of the balance due on the 930 shares, the sum of \$41,706.01 (R. 110). The judgment, however, is based on the *first theory* that the defendant as "Shareholder" of the trust was individually liable for his pro-rata interest in the trust.

### **The Important Facts.**

*The syndicate:* The Syndicate Agreement is conceded by the opinion (R. 164) to have constituted a valid trust under the Illinois law. It was executed by David E. Shanahan, Max Goldberg and Frank L. Webb, called "Managing Committee" and those signing the agreement called "Syndicate Members". It provided that the Managing Committee was to hold "legal title" to all funds and property "as Trus-

tees" for the use of the Syndicate Members "as beneficiaries of such trust". The name of the "Trust" was "Illinois Securities Syndicate". Its purpose was "for the acquisition and disposal of stock for the account of the Syndicate". The "entire management" of the Syndicate and its properties was (R. 45) in "the Managing Committee" with power to purchase and sell "in their own sole discretion". They were authorized to employ "agents" as they "may deem necessary". The Managing Committee was authorized (R. 46) to use such "agency" as in "their discretion from time to time may be necessary or convenient to carry out the purposes of the Syndicate", including the right to register the stock "in the name of such person" as it may from time to time determine.

It was provided in paragraph 7 of the Syndicate Agreement (R. 47):

"Neither the members of the Managing Committee nor the Syndicate Members shall be personally liable for any debt incurred or for any contract or undertaking made by the Managing Committee, as such, or by any agent or attorney acting on behalf of the Managing Committee. In every written contract or undertaking entered into by the Managing Committee reference shall be made to this agreement and such contract or undertaking shall provide that the person, firm or corporation so contracting with the Managing Committee shall look only to the funds and property held by them under this agreement as security for the performance of said contract or undertaking and for the payment of any debt, damage, judgment or decree, or of any money that may become due and payable in any way by reason of the execution of such contract or undertaking."

It was also provided in paragraph 10 (R. 48):

"The Managing Committee may use such corporate, trust or agency forms of organization or operation as in their discretion from time to time may be necessary

or convenient to carry out the purposes of the Syndicate, the certificates of stock or of interest in any such corporation or trust to be held in the name of such person or persons for the account of the Syndicate as the Managing Committee may from time to time determine on."

#### **Purchase of Bank Stock:**

This Syndicate purchased 1,000 shares in June 1929 from the Subsidiary of the Bank at \$650 per share. It paid \$200,000 in cash and for the balance of \$450,000 it executed a collateral note secured by the bank stock, signed by the trustees as "Syndicate Managers" and "*not individually*" (R. 99). Payments were made on the account of note with checks drawn on the Bank from the Syndicate account similarly signed by the trustees as "Syndicate Managers" and "not individually" and a copy of the syndicate agreement was lodged with the bank.

Respondent was not a creditor of the bank until July 25, 1931 (R. 5), and it did not extend credit on the financial status of the petitioner. There was no contractual relationship between petitioner and respondent. The bank stock remained registered in the name of Robert W. Martin when the stock liability accrued, and it remained in the possession of the subsidiary of the bank as security for the unpaid balance (R. 99).

The Syndicate was created to purchase stocks and bonds and to deal in securities generally (R. 44). The 930 shares of the bank stock was but a small fraction of the 14,000 shares outstanding so that the Syndicate had no control over the bank.

Dividends on the stock were paid to Martin and by him paid over to the Syndicate. Petitioner invested \$100,000 in the Syndicate and together with the investments of other shareholders the investment exceeded \$500,000 (R. 84, 85).

**The Summary Judgment:**

On June 18, 1937, after taking the judgment against Martin, respondent ascertained all of the facts concerning the Syndicate. No steps to collect the judgment from petitioner was taken until July 8, 1941, and there was collected under the Martin judgment \$50,727.33 (R. 84). The court entered the summary judgment for \$18,787.88 plus 5% interest from May 1, 1937 without deciding on which of the inconsistent causes of action it entered the judgment nor what theory it allowed the interest.

**The Affirmance:**

The Court of Appeals conceded that the Syndicate Agreement constituted a valid trust under the Illinois law and that the Federal law was inapplicable and the case must be controlled by the Illinois law. It also conceded that if a corporation had purchased the 930 shares in the name of Martin, neither the stockholders of the corporation nor its directors could have been held liable individually. It held, however, that a different rule applied to a trust and that its share-holders and trustees are personally liable.

**The Questions Presented.**

1. Whether under the Illinois law there is a distinction between share-holders of a valid trust and stockholders of a corporation so that shareholders of a trust are deemed owners of the bank stock which the trust purchased with its funds for its benefit in the name of a nominee, while shareholders of a corporation are exempt from liability on a similar purchase by a corporation.

2. May the liability of the petitioner be justified on the theory that petitioner was liable trustee in the face of a

a provision contained in the trust agreement exempting the trustees from personal liability there being no contractual relationship between the petitioner and the respondent and the bank with whom any contractual relationship was made had knowledge of an exemption from personal liability?

3. Whether rule (8)(c), permitting the joinder of inconsistent claims eliminated the substantive law of Illinois requiring an election between inconsistent causes at the trial and whether the election to take the judgment based on one of the inconsistent causes, that petitioner's liability was that of a share-holder, may be sustained on the other inconsistent cause, that he was liable as a trustee?

4. Whether Rule 54(d) applies to a summary judgment as to enable a party to recover on one theory and to urge the affirmance of judgment on a different and inconsistent theory.

5. Whether the federal decisions that there may be two concurrent judgments (1) against the registered owner and (2) against the beneficial owner run counter to the latest decisions of Illinois to the effect that there can only be one judgment under the Illinois constitution on a stockholder's liability.

6. Even if petitioner be considered as the beneficial owner of the bank stock, was it proper to join him as a defendant on July 8, 1941 after plaintiff had elected to hold the registered owner personally liable and obtained judgment against him on May 1, 1937 with full knowledge of the fact that he was a mere nominee, in view of the recent decisions of the Illinois courts?

7. Was it proper to allow interest under the Illinois law from July 8, 1941 when the complaint did not allege any facts justifying such allowance and the motion for a summary judgment did not ask for the allowance of any

interest and where no demand was ever made for the payment of the principal, and there was a bona fide dispute as to liability?

8. Whether the court properly entered the summary judgment in the face of factual issues which were raised by the pleadings?

9. Whether it was the duty of the court to sustain defendant's motion to rule on respondent to file its election on which of the inconsistent remedies it relied for the summary judgment.

10. Whether it was the duty of the court to sustain petitioner's motion to dismiss the complaint for want of equity.

#### **Reasons for the Allowance of the Writ.**

1. The Circuit Court of Appeals has decided an important question of local law in conflict with applicable Illinois decisions and with the decisions of this court, in that it held:

(a) That share-holders of a valid Investment Trust are liable for bank stock which the trust purchased with its funds for the trust in the name of its nominee, when no segregation of the bank stock was ever made among the share-holders of the trust, and when the stock was still held as collateral security for an unpaid balance, and the dividends were not distributed to the share-holders individually but to the trustees of the trust for the benefit of the trust, and when the bank stock was merely part of the securities which the trust held among other securities.

(b) While under the Illinois law share-holders of a corporation would not have been held individually liable on a similar purchase of bank stock, share-holders of a valid trust are liable.

2. The Court of Appeals has decided an important question of great public interest contrary to the accepted

State and Federal law, and created confusion and chaos in relation to the law of trust, undermining the foundation of the entire structure of trust investments, when it held:

(a) That persons who were never stock-holders of a bank were liable on the superadded stock-holders liability for the pro-rata investment in the shares of the trust to the extent of the bank stock which the trust held in its portfolio.

(b) That share-holders of a valid trust are owners of the stock purchased by the trustees for the trust, as distinguished from stock-holders of a corporation who are not deemed to be the owners of the stock which the corporation holds in its treasury.

3. The Court of Appeals misconstrued the meaning and intent of the new Federal Rules in that it held:

(a) That the substantive law of Illinois requiring an election between inconsistent remedies at the trial was abrogated by rule 8(e), permitting inconsistent pleadings.

(b) That a choice to take judgment on one of the inconsistent remedies was no bar to the affirmance of the judgment on another inconsistent remedy, in an absence of a cross appeal.

(c) That under rule 54(d), a plaintiff may move for a summary judgment on one theory and seek to affirm the judgment on a different theory.

4. The Circuit Court of Appeals refused to follow the rule in *Erie v. Thompson* in that it held:

(a) That there may be two concurrent judgments on the same bank stock and refused to follow the recent decisions of Illinois.

(b) That bank stock purchased by a valid trust is not the property of the trust but is the property of the individual share-holder prior to the dissolution of the trust and the division of the assets.

(c) That trustees of a valid trust who exempt themselves from personal liability were nevertheless personally liable to a creditor with whom they entered

into no contractual relationship and with whom they had no dealings and who did not extend credit on the faith of any contract with such trustees.

5. The decision is not in harmony with the Illinois law with the decisions of other circuits and with the decisions of this Court. It subjects all investments in trusts to the risk of personal liability and undermines the entire system of trust investments which are founded on limited liability to the same extent as corporate investments and such a decision deserves a review by this Court.

#### **Prayer for Relief.**

Petitioner prays that this petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit may be granted, and that upon a final hearing the judgment of the United States Circuit Court of Appeals for the Seventh Circuit be reversed with directions to set aside the judgment entered by the District Court, and that the costs be taxed against the respondent.

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